No. 344

IN THE

Supreme Court of the United States

October Term—1933

PUGET SOUND POWER & LIGHT COMPANY, a corporation,

Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Rehearing

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Petition for Rehearing

Comes now the above named appellant, PUGET SOUND POWER & LIGHT COMPANY, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

ACCEPTING THE PRINCIPLE THAT THE "EQUAL PROTECTION CLAUSE DOES NOT FORBID DISCRIMINATION WITH RESPECT TO THINGS THAT ARE DIFFERENT," APPELLANT ASSERTS THAT IN THIS CASE THERE IS *IN FACT* NO DIFFERENCE BETWEEN APPELLANT AND THE CITY AS TO THE LIGHT AND POWER BUSINESS IN WHICH BOTH ARE ENGAGED.

There is no doubt about the fact that the city is engaged in the light and power business in a proprietary capacity. This has been definitely established by the Supreme Court of Washington. (Cases cited at page 35 of appellant's brief.) The difference between the governmental and proprietary functions of the city is also recognized and definitely established by this court. In *South Carolina vs. United States*, 199 U. S. 437, 462, this court quotes and approves the following definite statement of the law with respect thereto:

> "Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a

borough or a city; it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

The ordinance exaction is not an income tax. It is not a property tax. It is a revenue license tax imposed by the city.

Both appellant and the city are engaged in the light and power business. Both sell electrical energy to the public for hire.

The Washington Supreme Court based its decision herein solely upon the premise that under the ordinance a tax is imposed upon the light and power business of appellant and is not imposed upon the light and power business of the city. That court, construing the ordinance, stated (*inter alia*):

"Conceding that the city's light and power revenues could be subjected to the tax, no machin-

ery is set up in the ordinance to accomplish such an end."

It was the province of that court to determine what the terms of the ordinance "authorized, commanded or forbade," and it is for this court to say whether "in view of its operation thus delimited it conflicts with the federal law."

Clement National Bank vs. Virginia, 231 U. S. 120, 134.

Regardless of how the state court reached its decision, its conclusion is stated in no uncertain terms:

"So the problem must be met as though Section 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and had exempted its own light and power business therefrom."

This definite decision of the Supreme Court of the state is not in any respect altered by a concession on part of counsel for the city that the ordinance imposes the tax upon the city's light and power business, or the assertion by counsel, of the city's willingness to pay the tax out of its gross revenues from that business. Unquestionably such concession and assertion are made in good faith by counsel. But counsel has no power to commit the city to the payment of the tax. The city can be committed only by ordinance lawfully enacted.

The decision of this court now is that there is a difference between the light and power business of

appellant and that of the city which warrants the imposition by the city of the ordinance tax upon appellant's business and the exemption of the city's similar business from the burdens thereof.

We do not controvert the principle that "the equal protection clause does not forbid discrimination with respect to things that are different." We do contend that if substance, not form, is controlling, there is no real difference between appellant and the city as to the light and power business in which both are engaged.

It would be conceded that a classification which would operate to impose the ordinance tax only upon men, or Democrats, or cooperative mutual organizations engaged in the light and power business, would be arbitrary and capricious. We contend that classification which the majority opinion in this case approves is equally arbitrary and capricious.

The use made of the net income, if any, of the business to be taxed has never been held to be the test of equality or inequality of a classification for license tax purposes. The capital stock of a private corporation engaged in such business may be owned wholly by Columbia University, or a church, or a hospital. The net income from the operation of the business may be used by the college, church, or hospital, or may be distributed as a dole to the unemployed. May such a fact be considered in determining whether a revenue

license tax imposed upon the business of selling light and power to the public for hire meets the requirement of equal protection of law, guaranteed by the Fourteenth Amendment? If the answer is in the affirmative, then the constitutional guaranty ceases to exist in fact. The tax imposed is not upon the proceeds of the business operation, or the use to which such proceeds may be dedicated. The tax is upon the business of selling light and power to the public for hire, in which business both appellant and the city are engaged. It seems wholly immaterial whether such proceeds, when earned, are converted into profits (if any) to stockholders, or into returns to customers by way of rebates or discounts, or into churches, schools, libraries or hospitals, or are converted into property to be used for the production and sale of more electrical energy.

The city is not performing any governmental function in selling electric light and power to its citizens. The public character of the service rendered by the city in supplying electrical energy to its customers is in no respect different from the character of the service rendered by appellant to its customers. The property of the city and the property of appellant used and useful in the business of selling electrical energy to the public for hire are both dedicated to the same public use.

The city is not engaged in the light and power business as a philanthropy. If, when and as the city

has power (which it does not now possess) and funds to enable it to give away electrical energy or to sell same at cost, it may or may not be necessary to consider the duties, if any, of the city to appellant under such facts. It may be that before that time arrives appellant's franchise will have expired. The present inquiry is as to the facts now operative. The city is now and for many years of necessity will be engaged in the business of selling light and power to the public for *profit*. Until all of the revenue bonds of the city have been paid out of earnings of its light and power business, the city must continue to operate same for profit. The revenue received by the city from said proprietary business is the sole source available for payment of said bonds.

At this point it seems in order to attempt to correct any misunderstanding that may exist as to the motive and purpose of appellant in alleging the issuance and existence of the city's revenue light and power bonds and the pledge by the city of the gross income of its light and power business to the payment thereof. In the minority opinion it is suggested that such facts were here presented because appellant "may have regarded the present suit as a suitable vehicle for getting its contention respecting such a pledge before a court," to the advantage of appellant in possible litigation as to the street railway bonds mentioned in the opinion. Appellant disclaims any such purpose.

The real purpose of appellant in alleging such facts, which are admitted by the demurrer, was to establish affirmatively that the city is in truth and in fact engaged in the business for profit. Until the principal of said revenue bonds is paid the city is obligated by the terms thereof and by the requirements of the underlying ordinances and statutes, to maintain rates which will be adequate to enable the city to operate and maintain its light and power business and to pay the principal and interest of said bonds. By reason of these facts it seems impossible to escape the conclusion that the city is in the business for profit—not for some philanthropic purpose. The result is the same in all respects as the result would be if the city invested its profits in some other enterprise or in real property rather than in the property and facilities used by it for the generation and sale of electric light and power.

With respect to the city's revenue light and power bonds, the argument was also presented that by reason of the covenants of the city therein, the city may not lawfully transfer any portion of the revenue received by it from its light and power business to the city's general fund; that therefore the attempt of the city to tax itself "so far as permitted by law" is an idle gesture.

This argument is consistent with the position that has been taken by the city itself. In a case now pending in the Supreme Court of Washington, being cause

Number 24943 in said court, entitled: "City of Tacoma, a municipal corporation, Respondent, vs. Tax Commission of the State of Washington, *et al.*, Appellants; City of Seattle, a municipal corporation, Intervenor, Respondent," the city is contesting the right of the State of Washington to impose a state occupation tax upon the city for the privilege of conducting its light and power business. (Ch. 191, Session Laws of 1933, State of Washington.) The legislative act imposes an occupation tax upon all persons engaged in the light and power business in the state, specifically including municipalities engaged in said business. The amount of the tax is measured by a percentage of the gross receipts of the taxpayers. In the trial court it was held that the state could not require the City of Seattle to pay the tax because of the pledge of the gross receipts of the city's light and power business to the payment of its light and power revenue bonds. The state appealed the case to the Supreme Court of the State of Washington. In that court the case has been argued and a decision may be available before this petition for rehearing is considered. Appellant is not a party to said action. In that case and in the brief of the city on file therein it is contended by the city that in application to it, the state occupation tax law is invalid because it operates to impair the contract obligation of the city to the holders of its light and power and street railway and water revenue bonds.

The following quotation is from page 7 of the city's brief in said case, at which page the city summarized the argument to be presented:

"ARGUMENT.

It is contended by the Cities that Chapter 191, particularly Section 2 (2) (c) [of the state occupation tax] is invalid as applied to them for two reasons: I. The Governor's purported veto of Section 2½ is void. II. The act in so far as it seeks to reach the revenues of the utilities, which revenues were theretofore lawfully pledged for the payment of revenue bonds and interest, impairs the obligations of the City's contracts with the holders of revenue bonds."

It is true that there is nothing in the present record to establish the foregoing facts. The reference, however, is to record facts on file in the Supreme Court of Washington. It is probable that a decision in the case above mentioned will be published within the next thirty days. When that decision is published the answer of the state court to the city's contention will be known.

The facts are that the only contention which the city may consistently make in this court is the contention made by it at pages 19-22 of its brief herein, which is that the city's inability to pay the tax is due to a want of power by reason of the operation of paramount law, namely, the contract clause in the Constitution of the United States. However, such a contention is unsound for the following reasons:

The "want of power" in the city to tax itself does not arise because of "any paramount law in favor of a portion of a class." There is and should be no "paramount" law which will enable the city to voluntarily place itself in a position to violate the Fourteenth Amendment to the Constitution of the United States. The city's presently asserted want of power (if any) to impose the tax upon its commercial enterprise is created by the city's desire for commercial as well as governmental supremacy in the field of the light and power business. The city was not required by any law to pledge the gross revenues of its light and power business to the payment of its bonded indebtedness, incurred in a commercial enterprise undertaken for profit and in a proprietary capacity. The city voluntarily made the contracts with the revenue bondholders because it was of advantage to the city to do so. There was no requirement of law that the city follow such procedure. It could have issued general lien bonds to finance its commercial light and power enterprise, had it been willing to submit same to the voters for approval, and successful in securing such approval. It seems wholly unsound to argue that by reason of the policy which the city voluntarily chose to follow for its own private advantage, it may thereby vest itself with power to contravene the Fourteenth Amendment to the Constitution of the United States and be thereafter free to deny equal protection of law to its com-

petitors in that commercial enterprise. The cases cited by the city (pages 19-22 appellee's brief) are irrelevant.

We earnestly urge this court to hold, consistent with the facts, that as to the light and power business in which both are engaged, the only difference between the city and appellant is one of ownership.

By reason of the foregoing considerations it is submitted that in application to appellant the ordinance operates to deny it equal protection of the law.

II.

THERE IS IN FACT NOTHING EXTRAORDINARY IN THE ARTICULATE PRINCIPLE CONTENDED FOR BY APPELLANT. APPELLANT'S CONTENTION IS THAT UNDER THE NOVEL FACTS OF THIS CASE THE IMPOSITION OF THE ORDINANCE TAX UPON APPELLANT IN TRUTH AND IN FACT CONSTITUTES AN APPROPRIATION OF ITS PROPERTY BY THE CITY FOR THE BENEFIT OF THE CITY'S LIGHT AND POWER BUSINESS, WITHOUT PAYMENT OF COMPENSATION.

We do not contend that the normal exaction of a tax lawfully imposed by the sovereign in any respect constitutes a taking of property without due process

of law. We do contend that under the novel facts of this case the imposition of the ordinance tax upon appellant in its *actual operation and effect* constitutes an appropriation of appellant's business by the city for the direct benefit of the city's proprietary light and power business.

We do contend that the vices of which appellant complains are not fears or apprehensions. They are realities which are inherent in any exercise by the city of any governmental power of excise taxation under the admitted facts.

At pages 63-71 of appellant's brief we endeavored to indicate the *practical* and *actual* results which follow the application of the ordinance to appellant. *Inter alia*, these will be the ultimate elimination of appellant from the light and power business in the city, the unlawful and oppressive invasion of the privacy of appellant's business by its competitor, and the unlawful appropriation of appellant's business and property by the city without compensation, all in direct aid and subsidy of the city's proprietary business.

The Washington Supreme Court recognizes the inherent unfairness of the tax, in the following language:

> "The possible consequences to appellant if it is subjected to an excise of three per cent upon

its gross revenues while its competitor escapes the burden are too obvious for discussion."

The risk of such discrimination was not one "assumed by appellant when it entered the field." Appellant did assume the risk of lawful municipal or private competition. It does not now shrink from meeting such legitimate competition.

Appellant did not assume the risk, however, of being required to contribute a portion of its competition-limited income to the general fund of its competitor, while its municipally owned competitor would escape from the burdens of such an exaction. Appellant did not assume the risk of being denied equal protection of the law.

Appellant did assume a risk that it would be required to meet the legitimate light and power rates and service of a competitor. The normal operation of the law of supply and demand, and the normal competitive features in the field of service and management were the only elements involved in any risks assumed by appellant.

Appellant did not assume a risk that its competitor, whether municipally owned or privately owned, could acquire power to confiscate its property.

The cause for appellant's complaint is not a so-called "congenital defect" in its property. It is the

attempt by the city to deplete appellant's state regulated and competition-limited gross income to the ultimate and direct benefit of the city's proprietary light and power business.

May it be suggested that there is nothing extraordinary in the implications of appellant's argument "when applied to expansions of government activities which have become commonplace"? The tax in question is not imposed by the state for the benefit of the state. It is not imposed by the United States. It is not an exaction which may be justified by reason of an emergency or as a social experiment. It is an exaction by the city, which is the taxpayer's competitor in a commercial enterprise, for ordinary revenue purposes. To deny the city the power to impose such a tax upon the business of its competitor, under the facts here presented, cannot possibly operate to curtail or impair any governmental functions of the city. In the light and power business, or any public utility business, by reason of its public nature and the fact that it is subject to regulation, the ultimate source of all excise tax exactions is the rate-payer. If the city may not perform its governmental functions without license tax revenue from the light and power business, (1) it may direct that the tax imposed be collected from all the rate-payers in the city and/or (2) it may legally impose the same burden which it imposes upon the light and power business of others, upon the light

and power business operated by the city, provided it actually pays said tax out of revenues received from its light and power customers. The granting of any greater power to the city inherently leads to the injustice, discrimination and unfairness which appellant is here resisting.

The articulate principle upon which appellant is relying to sustain its plea that any exercise of a power by the city to impose a revenue license tax upon its competitor constitutes a denial of due process of law under the facts of this case, is the prohibition against taking private property for private or public use without compensation. Sections 3 and 16, Article I, of the Constitution of the State of Washington prohibit such a taking. The due process clause of the Fourteenth Amendment is the similar prohibition in the federal Constitution.

The city may not directly appropriate appellant's property and business by condemnation without paying the fair value of same. The city should not be allowed to indirectly appropriate said property and business without resorting to condemnation and without paying the fair value thereof. Under the admitted facts, such an indirect appropriation inevitably follows the imposition of the ordinance tax upon appellant.

The following quotation from *Los Angeles Gas & Electric Co. vs. City of Los Angeles*, 241 Fed. 912,

921 (affirmed 251 U. S. 32), clearly states the articulate principle which should be here controlling:

> "As indicated hereinabove, assuming the necessity, propriety, and expendiency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. *I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade.*" (Italics supplied.)

Under the present decision of this court in the case at bar the asserted power of the city to annually appropriate three per cent of appellant's gross receipts (as asserted in the present ordinance) is confirmed. The city is also decreed the power to exempt its proprietary light and power business from the burdens of *any* contribution to the governmental expense of the city.

As grantee of the city, appellant is owner of a franchise which authorizes it to operate a light and power business in the city for a period of fifty years. In good faith appellant accepted said franchise, pio-

neered in developing that business and in rendering said public service, and invested large sums of its stockholders' money in property and facilities used exclusively for such purposes.

Under the facts here presented may the city now destroy the value of that property by appropriating appellant's gross receipts? May it be said that appellant should have anticipated that at some time before the expiration of appellant's franchise the city would be decreed power to confiscate appellant's property? May it be said that appellant should have anticipated that because the city might desire to impose a license tax upon the business of selling light and power to the public for hire, that only appellant's business would be subjected to such an exaction and that the similar business of appellant's competitors, if municipally owned, would be exempt from such a burden?

Under these facts may it be held that there is no relief for appellant in a court of law or in a court of equity? Facing the facts as they are, may it be said that the only relief available to appellant is legislative? May it be said that the city in fact has power by ordinance to compel appellant to cease doing business in the city? May it be said that while the city does not have power directly to legislate appellant out of business, it has power to accomplish the same end by the exercise of a governmental power of excise taxation?

Under these facts is the final holding of the courts to be that the city has power to tax appellant (its competitor) out of existence, by the exaction of a revenue license tax imposed only upon the light and power business of appellant?

If the answers to the foregoing questions are in the affirmative, then appellant and its stockholders became the innocent victims of a legal fraud when appellant accepted the franchise from the city, and thereafter in good faith invested their money in the light and power business in the City of Seattle.

Appellant earnestly submits that the judgment of the court in the case at bar operates to deny appellant and its stockholders that equality of treatment and that protection of their property which are the heritages of all citizens of the United States.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Washington Supreme Court be, upon further consideration, reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Clarence R. Innis, counsel for the above named appellant, Puget Sound Power & Light Company, for myself and associate counsel, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CLARENCE R. INNIS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1933.

Puget Sound Power & Light Company, Appellant, *vs.* The City of Seattle.	Appeal from the Supreme Court of the State of Washington.

[March 19, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Washington, 172 Wash. 519, sustaining a municipal license or excise tax, assailed by appellant as infringing the Fourteenth Amendment and the contract clause of the Federal Constitution.

An ordinance of the City of Seattle of May 23, 1932, imposes an annual license tax upon the privilege of carrying on the business of selling or furnishing electric light and power to consumers. The tax is 3% of the gross income from the business "in the city" during the fiscal year next preceding the tax year for which the license is required. The suit, brought to recover an installment of the tax already paid and to enjoin the collection of future installments, was heard and decided upon demurrer to appellant's complaint.

Both appellant, a Massachusetts corporation, acting under a municipal franchise, and appellee, the City of Seattle, acting by state authority, are engaged and actively compete in the business of furnishing electric light and power to consumers for hire. By state law the city is given plenary power to fix rates for the electric current which it distributes, and its rates are not subject to regulation and control by the Public Service Commission, as are those of appellant. § 10390, Remington's Rev. Stat. of Washington. Revenues of the city from its electric light business are required by the city charter, Art. VIII, § 9, to be deposited in a special "city light fund", separate from the general funds of the city, and transfer from one fund to the other, except by direction of the city council, is forbidden by the city charter. Art. IX, § 17.

Section 6 of the ordinance, in terms, imposes the same tax on the city "so far as permitted by law", as that levied on appellant. But it appears that the city, acting under a state statute, § 9491, Remington's Rev. Stat. of Washington, enacted before the taxing ordinance, has issued bonds, the payment of which, both principal and interest, is secured by the revenue of its electric light business. Appellant contends that by the statute, municipal ordinance, and the terms of the bonds themselves, this pledge is superior to all other charges upon the gross revenue and that the city cannot lawfully pay the tax. It appears that in fact the city has not paid the tax or made any provision for paying it. The state court, in passing on this question, said:

"The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; . . . ".

Whether by this statement the Court intended to decide that the city could not lawfully pay the tax, or assumed that to be the case for the purpose of the decision, it is unnecessary to determine, for appellant further insists that even though the tax were paid by the city to itself it would impose no actual burden.

Asserting that no effective tax is imposed with respect to the business carried on by the city, appellant argues that the taxation of its competing business is a denial of equal protection and deprives it of its property without due process. The tax is also assailed because the measure of it is vague and uncertain and because, by imposing a license tax upon the privilege of doing the business, the ordinance impairs appellant's franchise contract which gave it the right to conduct the business.

In sustaining the constitutionality of the tax, the state court found it unnecessary to ascertain whether, under the city charter and ordinances, and state law, the tax if paid by the city must be paid from its city light fund rather than from its general

fund, or to what extent moneys may now or hereafter be transferred from one fund to the other, or how far the general fund raised by taxation may be used otherwise, either directly or indirectly, to aid the city's electric lighting business. We do not attempt to resolve these questions here. Decision that the city is not authorized by existing law to aid its light fund by taxation, without disposing of the constitutional question decided by the state court, would entail the decision of other questions, arising under the equal protection and contract clauses, not raised or considered in the case. Moreover the appellant insists that in any case payment of the tax would neither relieve appellant of its burden nor impose a comparable burden on the city, since the same hand would both pay and receive the tax, and there is no constitutional limitation on the power of the city to use the tax when collected for the maintenance of the city's business. *Standard Oil Co.* v. *City of Lincoln*, 114 Neb. 245; aff'd *per curiam* 275 U. S. 504. All the questions thus suggested are met and disposed of by decision of the constitutional question which the state court decided and which we decide here.

1. There is no contention that appellant's franchise or any contract relieves it generally from the duty of paying taxes. It is not contended that a state or municipality, merely because it fails or is unable to tax its own property or business, is prohibited from taxing like property or business. The contention here is that constitutional limitations are transgressed only because the tax affects a business with which the taxing sovereign is actively competing. For that reason it is argued that the taxation involves a forbidden discrimination and deprives appellant of its property without due process since the combined power of the city to tax and to compete may be used to destroy appellant's business. As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.

In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, *Green* v. *Frazier*, 253 U. S. 233; *Jones* v. *City*

of Portland, 245 U. S. 217, and compete with private interests engaged in a like activity. *Standard Oil Co.* v. *City of Lincoln*, *supra*; *Madera Water Works* v. *Madera*, 228 U. S. 454; *Helena Water Works Co.* v. *Helena*, 195 U. S. 383.

We need not stop to inquire whether the equal protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extraordinary implications of appellant's argument when applied to expansions of government activities which have become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious. The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.

These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes. Compare *Springfield Gas Co.* v. *Springfield*, 257 U. S. 66; *Hollis* v. *Kutz*, 255 U. S. 452; *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415. The state may tax different types of taxpayers differently even though they compete. *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331; *Quong Wing* v. *Kirkendall*, 223 U. S. 59. It could not plausibly be argued that a private non-profit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants. Compare *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 40; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 418; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322. A business which in private hands might be exempted from taxation because not conducted for private profit is no less privileged because its capital is supplied by the government which controls it in the public

interest. These considerations are in no way affected by calling the city's activity "proprietary" instead of "governmental". Compare *South Carolina* v. *United States*, 199 U. S. 437, with *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151 and *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may protect from the consequences of competition, but the Constitution does not. *Helena Water Works Co.* v. *Helena, supra; Vicksburg* v. *Henson*, 231 U. S. 259. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 400; *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 276, nor can it relieve property of congenital defects, *Madera Water Works* v. *Madera, supra*, 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

Such was the decision in *Madera Water Works* v. *Madera, supra*, where this Court pointed out that in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed. See also *Springfield Gas Co.* v. *Springfield, supra*. Such must be our decision now.

2. The definition of gross income by § 2 of the ordinance, which is assailed as vague and indefinite, is that considered in No. 364, *Pacific Telephone & Telegraph Co.* v. *City of Seattle*. By §§ 10 and 20 the comptroller of the city is required to make rules and regulations, having the force of law, for carrying the or-